Supreme Court, U.S.
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In the

Supreme Court of the United States

ALTON B. HORNBACK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

ALTON B. HORNBACK
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QUESTIONS PRESENTED

1. Whether the United States Government abused its power of eminent domain by allegedly classifying privately developed intellectual property at the level of SECRET pursuant to a national security Executive Order, thereby depriving its owner of all use of that property over an extended period of time?

2. Whether the Ninth Circuit improperly held that the taking of Petitioner's intellectual property effected by Respondent over a 12-year period was an "intentional" tort, and therefore, the asserted tortious temporary takings claim was barred by statute?

3. Whether, in this case, the Ninth Circuit rendered a decision "without any articulable legal justification," which conflicts with a relevant decision of this Court, by holding that the temporary taking was an "intentional" tort?

4. Whether the Ninth Circuit contradicted itself by affirming District Court's construction of the asserted tortious temporary takings claim as a Fifth Amendment takings claim and thus barred by *res judicata*, after having held that the taking upon which the tortious temporary takings claim was based, was an "intentional" tort and thus barred by statute?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner- Alton B. Hornback
Respondent- United States of America

Petitioner is an individual with no corporate disclosures.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Alton B. Hornback, *pro se*, respectfully petitions for a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit").

JUDGMENT BELOW

The judgment of the Ninth Circuit is set forth in a 2-page unpublished MEMORANDUM denoted Appendix B (3a).[1] The ORDER denying rehearing and rehearing en banc is denoted APPENDIX A (1a).

JURISDICTION

Judgment of the Ninth Circuit was entered 13 April 2005, and the ORDER denying rehearing and rehearing en banc issued on 28 July 2005. The jurisdiction of this Court is invoked, pursuant to 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

(a) Federal Tort Claims Act (28 U.S.C. 1346(b), 2647)

This is the statute under which COMPLAINT was filed.

(b) Invention secrecy Act of 1952 (35 U.S.C. 181-188)

Section 181 of this Act provides in pertinent part:

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[1] Xa denotes the page number in the attached APPENDIX.

> If ... the publication or disclosure of the invention by granting of a patent therefor would be detrimental to the national security ... the Commissioner shall order that the invention be kept secret and shall withhold the grant of a patent for such period as the national interest requires, and notify the applicant thereof.

(c) Executive Order 12356 of 1982

Sections 6.1(b) and (c) define national security information:

> "Information" means any information or material, regardless of its physical form or characteristics, that is owned by, produced by or for, or is under the control of the United States Government.
>
> "National security information" means information that has been determined pursuant to this Order or any predecessor order to require protection against unauthorized disclosure and that is so designated.

Section 1.1(a)(2) defines "SECRET" as:

> "Secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security.

(d) Implementing Directive for Executive Order 12356

The FOREWORD (32a) of the January 1991 edition of the "Industrial Security Manual for Safeguarding Classified Information" (ISM), the implementing directive for Executive Order 12356, identifies those entities subject to its provisions:

The provisions of this Manual apply to all industrial, educational, commercial and other organizations and entities that have executed a DoD Security Agreement (DD Form 441) or a DoD Transportation Security Agreement (DIS Form 1149) with the Department of Defense.

Section 5-304 (35a) specifies the storage requirements:

SECRET STORAGE. SECRET material shall be stored in an approved security container or vault authorized for the storage of TOP SECRET without supplemental controls, or in a security cabinet or strongroom as follows:

a. A safe, steel file cabinet, or safe-type steel file container which has an automatic unit locking mechanism and an approved built-in combination lock with supplemental controls.

Section 5-513 (36a) defines disclosure requirements:

Contractors may disclose classified information during visits provided the visit is necessary for a government purpose; the parties involved possess the appropriate clearance and have a need-to-know for the classified information.

Section 4-105 (39a-40a) addresses privately developed information:

It should be noted, however, that E.O. 12356 prohibits a User Agency from classifying information over which the Government has no jurisdiction. The proposal or other material submitted may not be

> classified by a User Agency Unless: (i) it incorporates classified information to which the contractor was given prior access, or (ii) the Government first acquires a proprietary interest in the information.

STATEMENT OF THE CASE

1. The Proceedings Below

On 19 February 2004, Petitioner filed a COMPLAINT in the United States District Court, Southern District of California, titled "COMPLAINT FOR DAMAGES PURSUANT TO THE FEDERAL TORT CLAIMS ACT (28 U.S.C.A. 1346(b), 2674)". The cause of action as set forth in the COMPLAINT at 1 (42a-43a) reads:

> (1) the theft, or tortious "temporary" taking, of all use by Plaintiff, of his intellectual property over a 12-year period; and
>
> (2) for other tortious acts committed during the course of that taking, which include fraud, conspiracy to defraud, perjury, and the suppression of evidence of those acts.

Only the tortious "temporary" takings claim will be addressed here.

District Court dismissed the COMPLAINT on the ground that "Plaintiff's first claim [was] for a Fifth Amendment taking of his intellectual property" and was, therefore, "barred by the doctrine of res judicata". (26a). Upon reconsideration the Court held (8a):

> Plaintiff alleges that Defendant committed several acts constituting fraud during the pendency of the secrecy order on Plaintiff's patent application. Therefore, to the extent Plaintiff is alleging a tortious taking those allegations fall squarely within the prohibitions of 28 U.S.C. 2680(h). Therefore, Plaintiff's tortious takings claims (sic) fail.

The Ninth Circuit affirmed the decision of District Court by holding that the taking was an "intentional" tort. (4a).

2. Statement of the Facts

On 25 April 1986 Petitioner filed with the Patent and Trademark Office (PTO), a patent application for an invention titled "Real-Time Boresight Error Slope Sensor". That SENSOR can: (i) maintain missile stability in an ABM missile such as the Advanced Patriot (PAC-3), operating in the altitude/velocity regime encountered in a ballistic missile intercept, by suppressing oscillations in a parasitic loop from body motion to apparent target motion and back through the guidance gain to body motion; (ii) permit wide bandwidth HARM type seekers to be used against moving targets, including stealth aircraft; and (iii) improve the cost-effectiveness of all missiles which use a terminal homing seeker.

On 24 August 1987, the PTO imposed a Secrecy Order on that application which stated that the patent application was "to be protected at the Classification Level of Secret" (44a) and that:

> you are ordered to keep the subject matter secret (as required by 35 U.S.C. 181) and you are further ordered NOT TO PUBLISH OR DISCLOSE the

> subject matter to any person except as specifically authorized herein.

That Secrecy Order further stated (45a):

> The subject matter of the above-identified application has been determined to be encompassed by E.O. 10865, entitled "Safeguarding Classified Information Within Industry" or E.O. 12356, entitled "National Security Information" and thus is subject to the "Industrial Security Manual for Safeguarding Classified Information".

On 17 September 1987 the PTO issued a "NOTICE OF ALLOWABILITY" (47a) which states: "in view of the secrecy order issued August 24 1987, under 35 U.S.C. (1952) 181, this application will be withheld from issue during such period as the national interest requires". That 1987 Secrecy Order was rescinded on 21 April 1999. (48a).

On 27 June 2000, Patent No. 6,079,666 (Page 1, 49a) issued in Petitioner's name.

3. Basis of Jurisdiction in the Court of First Instance

Petitioner is now, and at all times referenced herein was, a resident of San Diego, California, which is within the geographical jurisdiction of The United States District Court Southern District of California.

Subject matter exclusive jurisdiction of the underlying cause of action in that Court is set forth in 28 U.S.C. 1346(b).

ARGUMENT FOR ALLOWANCE OF THE WRIT

1. Abuse of the Power of Eminent Domain (Question 1)

If certiorari is denied, the Government will, thereby, be emboldened to take any property it desires without compensation, simply by invoking national security, classifying that property at the level of SECRET, revoking the owner's security clearance, if any, and then declaring the taking to be an intentional tort.

The Government has no authority, whatsoever, to classify private property, and thereby, deprive a private citizen with no personnel of facility security clearance, the right of access to his own property.

The Invention Secrecy Act (35 U.S.C. 181-188) requires only that the subject matter be *kept* "secret" as the word is usually defined. That is a far cry from being *classified* "SECRET" as defined in Section 1.1 (a)(2) of Executive Order 12356. Moreover, that Act was enacted in 1952. Therefore, in 1952, Congress did not authorize, and could not have authorized, a Secrecy Order which mandated compliance with Executive Order 12356 and its implementing directive, the ISM, neither of which even existed until 1982. The specifications in the 1987 Secrecy Order which mandated compliance with those authorities (45a) were, therefore, clearly illegal.

The clause in the Secrecy Order following the words "(as required by 35 U.S.C. 181)" which reads: "and you are *further* ordered ... " (45a, emphasis added) is *prima facie* evidence that such authority does not flow from that statute. And no Court has ever held otherwise.

Moreover, the implementing directive for Executive Order 12356, itself, states that the Government may not classify privately developed information unless "the Government first acquires a proprietary interest in the information". (40a).

Finally, such a taking without compensation violates this Court's own precedent. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 305 (1987): "But where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective".

2. Temporary Taking NOT an "Intentional" Tort (Ouestion 2)

The Governmental act which gave rise to the tortious "temporary" takings claim (Claim 1, 42a) was the illegal specification in the 1987 Secrecy Order (44a) which was not rescinded until 1999 (48a), that the patent application was "To be protected at the Classification Level of Secret". Since Petitioner is a private citizen with no personnel or facility security clearance, he could not possibly comply with that requirement. The Government, therefore, took physical possession of the subject matter in the patent application for safeguarding and denied Petitioner all access to it during the 12-year period that specification was in effect.

Black's LAW DICTIONARY defines "intentional tort" as "a tort in which the actor is expressly or impliedly judged to have possessed intent or purpose to injure". Clearly, the requirement that the subject matter in the patent application was "To be protected at the Classification Level of Secret", neither expressed nor implied any intent or purpose to injure

Petitioner. Quite the contrary! That requirement was imposed precisely to prevent injury to the *entire nation*, of which Petitioner -- and indeed, this very Court -- is a part. That conclusion follows from the definition of the classification level of SECRET, as set forth in Section 1.1(a)(2) of Executive Order 12356 (emphasis added):

> "Secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the *national security*.

3. Finding of "Intentional" Tort Unsupported (Question 3)

In its MEMORANDUM (4a), the Ninth Circuit simply asserted, *ipse dixit*, that the tortious taking was an "intentional tort", and therefore, the tortious takings claim was barred pursuant to 28 U.S.C. 2680(h). If such an unsupported finding is allowed to prevail, any Court could circumvent this Court's precedent simply by declaring a "temporary" taking to be an "intentional tort". In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 305 (1987), this Court held: "But where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective".

4. Fifth Amendment Taking is NOT a Tort (Question 4)

In its ORDER (22a, Analysis) dismissing the COMPLAINT, District Court willfully and knowingly misrepresented the cause of action by stating:

> In this case Plaintiff brings two distinct claims against the Defendant: (1) a "temporary" taking claim based on Defendant's alleged taking of Plaintiff's intellectual property over a twelve year period; and (2) a Federal Tort Claims Act for the "tortious acts committed during the course of the taking which include fraud, conspiracy to defraud, perjury, and the suppression of evidence of those acts". Complaint, p. 1.

That statement indicates that: (i) the takings claim was not a *tortious* takings claim; and (ii) that claim was not filed under the Federal Tort Claims Act (FTCA). Both are false!

Both claims were, indeed, filed under the FTCA. And the takings claim was not for just a "temporary" taking; it was for a *tortious* "temporary" taking. (42a). That misrepresentation of the cause of action was clearly willful in order to support the finding (26a) that the taking was a Fifth Amendment taking, thereby enabling the Court to invoke the doctrine of *res judicata* to bar the takings claim.

However, nowhere in the COMPLAINT nor in any subsequent brief, did Petitioner even mention the Fifth Amendment. The Fifth Amendment states: "nor shall private property be taken for *public use* without just compensation". (Emphasis added). But the property was NOT taken "for public use". Quite the contrary! *It was taken, without compensation, precisely to prevent ANY use, except use by the Government*, by classifying that property at the level of SECRET in violation of Executive Order 12356. (40a). Therefore, the taking was a "tortious" taking, not a Fifth Amendment taking.

Since a Fifth Amendment taking is not a tort, the Ninth Circuit clearly contradicted itself by affirming District Court's

finding that the taking was a Fifth Amendment taking, after holding that the "tortious" taking was an "intentional tort". (4a).

CONCLUSION

WHEREFORE, PETITION FOR WRIT OF CERTIORARI should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-57057

D.C. No. CV-04-00339-WQH

[Filed July 28, 2005]

ALTON HORNBACK, Plaintiff- Appellant,	)
v.	)
UNITED STATES OF AMERICA, Defendant - Appellee.	)

ORDER

Before: B. FLETCHER, TROTT, and PAEZ, Circuit Judges

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

No further filings will be accepted in this closed case.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-57057

D.C. No. CV-04-00339-WQH

[Filed April 13, 2005]

ALTON HORNBACK, Plaintiff- Appellant,	)
v.	)
UNITED STATES OF AMERICA, Defendant - Appellee.	)

MEMORANDUM*

Appeal from the United States District Court for the Southern District of California William Q. Hayes, District Judge, Presiding

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Submitted March 23, 2005**

B. FLETCHER, TROTT, and PAEZ, Circuit Judges.

Alton B. Hornback appeals pro se the district court's dismissal of his action alleging the United States violated the Federal Tort Claims Act ("FTCA") in processing his patent application. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *O'Toole v. United States*, 295 F.3d 1029, 1032 (9th Cir. 2002) (dismissals for lack of subject matter jurisdiction under the FTCA); *Stewart v. U.S. Baneorp*, 297 F.3d 953,956 (9th Cir. 2002) (dismissals based on res judicata). We affirm.

The district court properly determined it lacked subject matter jurisdiction over this action, because Hornback's claims based on the alleged fraudulent behavior defendants exhibited and tortious taking they effected during the time his patent application was held under a secrecy order constitute intentional torts to which the FTCA does not apply. *See Owyhee Grazing Ass'n, Inc. v. Field*, F.2d 694, 697 (9th Cir. 1981) (fraud, conspiracy, and misrepresentation amongst tortious conduct for which the United Sta. s has not consented to be sued, as provided by 28 U.S.C. § 2680(h)).

To the extent the district court construed Hornback's temporary takings claim to allege a violation of the Fifth Amendment, this claim had been dismissed in a previous action. *Hornback v. United States*, 91 Fed. Appx. 679, 681-82 (Fed. Cir. 2004) (per curiam) (nonprecedential).

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Accordingly, the district court properly dismissed the takings claim based on res judicata. *See Stewart,* 297 F.3d at 956.

We find Hornback's remaining contentions unpersuasive.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No.04-CV0339-WQH (Wmc)

[Filed November 9, 2005]

ALTON B. HORNBACK,	)
Plaintiff,	)
	)
v.	)
	)
UNITED STATES OF	)
AMERICA	)
Defendants.	)
	)

ORDER RE: PLAINTIFF'S MOTION FOR RECONSIDERATION [Doc. No. 14]

Plaintiff Alton B. Hornback ("Plaintiff' or "Hornback") moves this Court for reconsideration of it's Order of August 19, 2004 denying Plaintiff's motion for summary judgment and granting Defendant's motion to dismiss. The Court finds the resolution of this motion suitable for decision on the parties' papers without oral argument, pursuant to Local Civil Rule 7.1(d)(1).

I. Introduction

On February 12, 2004, Plaintiff filed a complaint for damages pursuant to the Federal Tort Claims Act seeking damages and compensation in the amount of $12,000,000.00. Plaintiff's complaint arises out of his claim that Defendant improperly imposed one or more secrecy orders on his patent application for an invention called a "Real-Time Boresight Error Slope Sensor." Plaintiff claims the secrecy orders effected a temporary taking of his intellectual property rights for which he was not adequately compensated. Plaintiff has extensively litigated his claims in this and other forums. In fact, Plaintiff has filed at least ten actions asserting various grounds of recovery against Defendant.[1]

On August 19, 2004, the Court issued an order denying Plaintiff's motion for summary judgment and granting Defendant's motion to dismiss. Plaintiff now moves to reconsider that order. Plaintiff states that his motion for reconsideration is based on (I) "the misapprehension of the nature of the takings claim"; (2) "the premise that the doctrines of *res jadicata* [sic] and *stare decisis* fall asunder, where, as here, it is conclusively established that the previous decisions were in error"; and (3) Plaintiff argues that the denial of his motion for summary judgment was in error. *Plaintiff's Amend. Mot.*, p. 1.

II. Legal Standard

Absent "highly unusual circumstances," reconsideration is appropriate only where (1) the court is presented with

---

[1] A detailed description of Plaintiff's prior litigation history is included in this Court's August 19, 2004 Order.

newly-discovered evidence or (2) the court "committed clear error or the initial decision was manifestly unjust" or (3) there is an intervening change in controlling law. *School Dist. No. 1J, Multnomah County v. AC and S, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993); *United States v. James*, 915 F. Supp. 1092, 1098 (S.D. Cal. 1995). "[R]eargument should not be used as a means to argue new facts or issues that inexcusably were not presented to the court in the matter previously decided." *Bhatnagar v. Surrendra Overseas, Ltd.*, 52 F.3d 1220, 1231 (3d Cir. 1995).

III. Discussion

Plaintiff's first asserted ground for reconsideration is that the Court made a mistake in it's ruling because Plaintiff is not claiming a Fifth Amendment taking, rather he is asserting a "tortious" taking claim. As discussed in the August 19, 2004 Order, the problem for Plaintiff is that the United States has not waived it's sovereign immunity to claims arising out of misrepresentation and deceit. 28 U.S.C. § 2680(h). Plaintiff alleges that Defendant committed several acts constituting fraud during the pendency of the secrecy order on Plaintiff's patent application. Therefore, to the extent Plaintiff is alleging a tortious taking those allegations fall squarely within the prohibition of 28 U.S.C. § 2680(h). Therefore, Plaintiff's tortious takings claims fail.

Plaintiff's second argument in support of his motion for reconsideration is that this Court erred by improperly applying the doctrine of res judicata to bar his temporary takings claim. Plaintiff argues that the Federal Circuit decision[2] this Court relied on in barring the temporary takings

[2] Plaintiff pursued a temporary taking claim before the Court of Federal Claims in Case No. 02-1915 C. There, the Court of

claim was not entitled to res judicata effect. According to Plaintiff, the Federal Circuit's decision improperly determined the accrual date for the statute of limitations on his temporary taking claim. The Court concludes, however, that Plaintiff's temporary taking claim continues to be barred by res judicata principles.

Federal Claims held that his claim was barred by res judicata and the Federal Circuit affirmed. *Hornback,* 56 Fed. CI. at 363, *aff'd, No.* 03-5099 (Fed. Cir. Jan. 13, 2004). The Federal Circuit held:

> First, Hornback asserts mat the doctrine of res judicata is inapplicable because the Court of Federal Claims did not previously address his temporary takings claim on the merits. He distinguishes his claim in the present case from his claim in the earlier Case No. 99-38 C on the basis that the earlier claim was filed while the secrecy order was in effect and therefore alleged a permanent taking, whereas the present claim was filed after the secrecy order was rescinded and therefore alleged only a temporary taking...
>
> Recently, we affirmed the Court of Federal Claims' dismissal of another of Hornback's takings claims on the ground that Hornback was collaterally estopped from arguing that his filing was timely. [citations omitted] In that case, we specifically addressed Hornback's allegation that "for 13 years, [from 1987 when the secrecy order was imposed until 2000 when the patent issued] Plaintiff was deprived of all use of his property." [citations omitted]. Thus, Hornback has previously, raised, and we have previously considered the same temporary takings theory that he now asserts in the present case. That claim was adjudicated on the merits when we held that it was untimely, based on Hornback's previous litigation of the statute-of-limitations issue.

Hornback, No. 03-5099 (Fed. Cir. Jan. 13, 2004).

Res judicata, or claim preclusion, precludes the relitigation of a claim previously tried and decided. *Clarke. Bear Stearns & Co.*, 966 F.2d 1318, 1320 (1992). Any basis or theory of recovery that a litigant could have asserted in the previous litigation, is barred by res judicata if the prior suit was between the same parties on the same cause of action. *Id; Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001). "Res judicata applies when there is: (1) an identity of claims; (2) a final judgment on the merits; and (3) identity or privity between the parties." *Stuart v. U.S. Bancorp*, 297 F.3d 953, 956 (9th Cir. 2002). Courts in the Ninth Circuit look to the following factors to determine if a cause of action is the same as brought in a previous litigation: (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. *Clark*, 966 F.2d at 1320.

The Court reaffirms it's conclusion that this case presents the same causes of action as Plaintiffs previous cases. The factors supporting that conclusion include: (1) the rights of the parties established in the prior cases would be substantially impaired by prosecution of this case, (2) the same evidence is presented in this action as in Plaintiff's prior suits against Defendant, (3) the suits involve the infringement of the same right - the alleged taking, whether permanent or temporary of Plaintiff's intellectual property rights, and (4) the suits arise out of the same transactional nucleus of facts (for instance, the classification of the patent application). Therefore, the Court finds that the doctrine of res judicata bars the relitigation of Plaintiff's takings claim.

Finally, Plaintiff requests *reconsideration* of this Court's order denying his motion for summary judgment. The Court concludes that Plaintiff fails to state grounds sufficient to justify reconsideration of that order. Accordingly, the Court **DENIES** Plaintiff's motion for reconsideration.

IV. Conclusion

Having reviewed the papers submitted and the relevant law, **IT IS HEREBY ORDERED** that Plaintiff's motion for reconsideration [doc. no. 14] is **DENIED**.

IT IS SO ORDERED.

/s/ Hon. William Q. Hayes
HON. WILLIAM Q. HAYES
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No.04-CV0339-WQH (Wmc)

[Filed August 19, 2005]

ALTON B. HORNBACK, Plaintiff,	)
v.	)
UNITED STATES OF AMERICA Defendants.	)

ORDER RE: PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S MOTION TO DISMISS [Doc. No.'s 4 & 8]

Plaintiff Alton B. Hornback ("Plaintiff" or "Hornback") moves this Court for summary judgment. In addition, Defendant United States of America ("Defendant" or "Government") moves to dismiss Plaintiff's complaint. The Court finds the resolution of both of these motions suitable for decision on the parties' papers without oral argument, pursuant to Local Civil Rule 7.1(d)(1)

I. INTRODUCTION/FACTUAL BACKGROUND[1]

A. Plaintiff's Complaint

On February 12, 2004, Plaintiff filed a complaint for damages pursuant to the Federal Tort Claims Act seeking damages and compensation in the amount of $12,000,000.00. Plaintiff's complaint alleges that the Defendant improperly imposed one or more secrecy orders on his patent application for an invention called a "Real-Time Boresight Error Slope Sensor." Plaintiff claims that the secrecy orders effectively served as a temporary taking of his intellectual property rights.

According to Plaintiff, his invention is designed to,

> (I) to prevent parasitic oscillations in an ABM missile such as the Advanced Patriot PAC-3), operating in the altitude/velocity regime encountered in an anti-ballistic missile intercept; (ii) to permit wide bandwith HARM type seekers to be used against emissions from moving targets, including stealth aircraft; and (iii) to improve the cost/effectiveness of missiles which use either a radar, or an infra-red, terminal homing seeker.

Complaint, p. 2.

Plaintiff alleges that on April 25, 1986, he filed a patent application with the Patent and Trademark Office ("PTO") for

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[1] The following factual background is derived from Plaintiff's complaint and the parties' respective papers submitted in connection with Plaintiff's motion for summary judgment and Defendant's motion to dismiss.

his invention. Plaintiff further alleges that on April 16, 1987, the Air Force classified his invention as Secret, pursuant to Executive Order 12356. *Complaint, p.* 2. Plaintiff alleges that the Government did not have the authority to classify his patent application as "Secret." *Id.* at p. 2. Thereafter, on August 24, 1987, according to Plaintiff, the PTO imposed a Secrecy Order on his application. *Id.* at p. 3. Plaintiff also alleges that on September 17, 1987, the PTO issued a "notice of allowability" stating that Plaintiff's patent application was in condition for allowance but that in view of the secrecy order the application would be withheld from issue during such time as the national interest requires. *Id.* On April 2 I, 1999, the Secrecy Order was rescinded and on June 27, 2000, the PTO issued Plaintiff's patent, *Id.* Plaintiff alleges that the Government's actions constitute a tortious taking, fraud, conspiracy, perjury, and suppression of evidence. *Id.* pp. 3-4.

Plaintiff alleges that the Government could have realized a $120 million savings by utilizing his invention and that he is entitled to $12 million dollars for the temporary taking, *Id.* at p. 6. However, Plaintiff's complaint does not allege that Defendant has actually utilized his invention on it's ABM missiles without compensating him.

B. Plaintiff's Previous Litigation History

This case is not the first time Plaintiff has litigated his claims against the Government. Plaintiff has filed similar cases in this district and before the Court of Federal Claims over the last fifteen years.

1. Southern District of California Cases

a. *Hornback v. United States*, Civil Action No. 89-1914-R(M) (S.D. Cal. Oct. 2, 1992) aff'd, 16 F.3d 422 (Fed. Cir. 1993).[2]

Plaintiff first brought suit on his claims for damages resulting from the classification of his patent application and the imposition of a secrecy order on that application in the Southern District of California in 1989. Plaintiff brought suit under 35 U.S.C. § 183 alleging damages caused by the imposition of the secrecy order and for the "severe and total damage defined by the eminent domain taking" of [Plaintiffs] property." The district court granted summary judgment in favor of the Government. *See* October 2, 1992 Order, attached to Defendant's Motion to Dismiss. The district court found that Plaintiff had not alleged any actual damages or "concrete evidence of damages" as required by Section 183. In addition, the district court found that Plaintiff could not state a Fifth Amendment taking claim because Section 183 is an exclusive remedy for parties in Plaintiff's position, *Id.* at 5-6. On December 22, 1993, the Federal Circuit affirmed the district court's judgment in an unpublished opinion.

b. *Hornbaek v. United States*, No. 94CV0952-IEG (S.D. Cal.), aff'd, 91 F.3d 152 (9th Cir. 1996) (unpublished)[3]

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[2] The Federal Circuit's opinion was non-precedential, however, under Federal Circuit rules a non-precedential opinion may be used for claim or issue preclusion. Federal Circuit Rule 47.6(b).

[3] While United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") provides that its unpublished opinions are not binding precedent, they may be used for res judicata or collateral

In the second case brought by Plaintiff in the Southern District of California, Plaintiff again alleged that the Government took his invention by classifying his invention as secret and placing a secrecy order on his patent application, requiring compensation under the Fifth Amendment. *Hornback v. United States,* 91 F.3d 152 (9th Cir. 1996)(unpublished). The district court dismissed Plaintiff's complaint for lack of subject matter jurisdiction under 28 U.S.C. § 1346(a)(2) because Plaintiff alleged just compensation greater than $10,000.00. *Id.* The district court also refused to transfer Plaintiffs case to the Court of Federal Claims because the six-year statute of limitations had run. *Id.* The Ninth Circuit affirmed the judgment of the district court dismissing Plaintiff's complaint. The Ninth Circuit specifically affirmed the district court's conclusion that (I) because Plaintiff sought more than $10,000 in monetary relief the district court lacked subject matter jurisdiction and (2) Plaintiff's Fifth Amendment takings claim accrued no later than April 1987 when the Air Force notified him that his invention had been classified as secret and the statute of limitations had therefore run on his claim, *Id.*

2. Court of Federal Claims Litigation

Plaintiff has also filed a series of cases in the Court of Federal Claims: *Hornback v. United States,* No. 96-121 C; *Hornback v. United States,* No. 96-647 C; *Hornback v. United States,* No. 98-58 C; *Hornback v. United States,* No. 99-38 C; *Hornback v. United States,* No. 99-168 C; *Hornback v. United States,* 00-374 C; *Hornbaek v. United States,* 01-99 C; *Hornback v. United States,* 01-136 C; *Hornback v. United*

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estoppel purposes. Ninth Circuit Rule 36-3.

States, No. 02-1915 C; *Hornback v. United States,* No. 03-2063 C.

In five prior cases, two of which were consolidated in the Court of Federal Claims, Plaintiff asserted that he was entitled to compensation for the classification of information in his patent application and the imposition of a secrecy order on that application under a variety of theories, including: Fifth Amendment taking, 35 U.S.C. § 183, and improprieties related to the classification of his patent application. *Hornback v. United States,* No. 99-168 C (consolidated with 00-374 C (Fed. CI. May 13, 2003); *Hornback v. United States,* No. 56 Fed. CI. 462 (Fed. CI. 2003) (No. 01-99 C); *Hornback v. United States,* 56 Fed. CI. 359 (Fed. CI. 2003) (No. 021915 C); *Hornback v. United States,* 52 Fed. CI. 374 (Fed. CI. 2002) (No. 99-38 C). These cases all resulted in dismissal of Plaintiffs claims with prejudice by the Court of Federal Claims and all of these judgments were affirmed on appeal.

a. *Hornback v. United States*, 52 Fed. Cl. 374 (Fed. CL 2002) (No. 99-38 C), *aff'd,* No. 02-5111, 2002 WL 31796654 (Ted. Cir. Dec 4, 2002) (non-precedential)

In this case Plaintiff alleged a Fifth Amendment taking of his property when the Government imposed a security classification on his patent application, withheld the patent from issue, willfully took physical possession of that application and its subject matter, and denied him the fight to possess a copy of his patent application when his security clearance was revoked upon retirement. *Complaint,* Case No. 99-38 C; *Hornback,* 52 Fed. CI. at 375. The Court of Federal Claims dismissed Plaintiff's complaint holding that Plaintiff's taking claim was barred by the six-year statute of limitations, *id.* at 383, and was also barred by res judicata in light of the

two previous cases filed by Plaintiff in the Southern District of California that were litigated to decisions on the merits,/d, at 386.

The Court of Federal Claims also held that Plaintiff was barred from relitigating the issue of whether his takings claim was barred by the statute of limitations. *Id.* at 387. Further, the court held that Plaintiff was barred from relitigating the issue of whether 35 U.S.C. § 183 provides the exclusive remedy for damage sustained by the imposition of a secrecy order on a patent application. *Id.* at 389. The Court of Federal Claims decision was affirmed by the Federal Circuit on appeal. *Hornback,* 2002 WL 31796654.

b. *Hornback v. United States*, No. 99-168 C consolidated with 00-274 C (Fed. Cl. May 13, 2004)

Plaintiff brought these two cases under theories of recovery under 35 U.S.C. § 183 for damage caused by the imposition of the secrecy order and for the alleged unauthorized use by the Government of Plaintiff's invention. *Hornback,* No. 99-168 C c/w 00-374, slip op. at 2. The Court of Federal Claims held that Plaintiff's claim was barred by res judicata or claim preclusion because Plaintiff could have raised those theories of recovery in previous cases before the Court of Federal Claims. *Id.* at 4. The Court of Federal Claims judgment was affirmed on appeal by the Federal Circuit. *Hornback v. United States,* Nos. 03-5108, -5111 (Fed. Cir. January 13, 2004) (non-precedential).

c. *Hornback v. United States*, 56 Fed. CL 462 (Fed. CI. 2003) (No. 01-99 C)

In this case, Plaintiff sought damages for "the propriety interest in his intellectual property acquired by the U.S. Government which was mandated by 32 C.F.R. § 159a.15(eX3) as a prerequisite for its classification at the level of SECRET pursuant to Executive Order 12356." *Complaint, Case* No. 01-99 C. After issuing a show cause order why the complaint should not be dismissed, the Court of Federal Claims held that Plaintiff's claim was barred by res judicata again because Plaintiff could have raised this theory of recovery in a previous suit or, in the alternative, Plaintiff had not stated a claim because the regulatory authority under which he premised his claim did not exist at the time his action accrued. *Hornback,* 56 Fed. Cl. at 465 and 464 n. 3. This judgment was recently affirmed on appeal. *Hornback v. United States,* Nos. 035108, -5111 (Fed. Cir. January 13, 2004) (non-precedential).

d. Hornback v. United States, 56 Fed. Cl. 359 (Fed. Cl. 2003) (No. 02-1915 C)

In this case, Plaintiff raised a temporary takings theory of recovery for the Government's imposition of a secrecy order on his patent application, as well as damages for alleged improprieties committed during the taking. The Court of Federal Claims found Plaintiff's claim barred by res judicata. *Hornback,* 56 Fed. Cl. at 363. The Court of Federal Claims also held that Plaintiff's claim was barred by the statute of limitations and that 35 U.S.C. § 183 provided that the exclusive remedy for harm imposed by the secrecy order, *Id.* at 364. Further, the court held that it lacked subject matter jurisdiction to hear Plaintiff's claim for the alleged improprieties committed during the taking. *Id.* at 365. The

Federal Circuit affirmed. *Hornback v. United States,* No. 03-5099 (Fed. Cir. January 13, 2004) (non-precedential).

Recently the Federal Circuit warned Plaintiff that continued filing of claims is frivolous. In a *per curiam* order the Federal Circuit stated,

> Hornback has now had substantial opportunities to challenge the PTO's secrecy order and to raise various theories concerning recovery of damages against the United States government. While the courts of the United States are open for individuals to make claims against their government, continued challenges concerning the same set of underlying facts eventually constitute an abuse of the judicial system. Such a point has now been reached. Hornback is therefore warned that further appeals involving claims based on the same set of facts, whether raising the same or new theories, may be held to be frivolous and subject to sanctions, see Fed. R. App. P. 38.

Hornback v. United States, Nos. 03-5108, -5111, slip op. at 8-9 (Fed. Cir. Jan. 13, 2004).

III. Discussion

A. Defendant's Motion to Dismiss

Defendant moves to dismiss Plaintiff's complaint on grounds that (1) Plaintiff's complaint is barred by res judicata and collateral estoppel; (2) Plaintiff's complaint is barred by the statute of limitations; (3) the Court lacks subject matter jurisdiction over the complaint; and (4) Plaintiff failed to exhaust his administrative remedies.

1. Legal Standards

a. Failure to State A Claim

A Rule 12(b)(6) motion tests the sufficiency of the complaint. *Navarro v. Block,* 250 F.3d 729, 732 (9th Cir. 2001). Dismissal of a claim under Rule 12(b)(6) is appropriate only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *Navarro,* 250 F.3d at 732. Dismissal is warranted under Rule 12(b)(6) where the complaint lacks a cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc.,* 749 F.2d 530, 534 (9th Cir. 1984); *see Neitzke v. Williams,* 490 U.S. 319, 326 (1989) ("Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law."). Alternatively, a complaint may be dismissed where it presents a cognizable legal theory yet fails to plead essential facts under that theory. *Robertson,* 749 F.2d at 534.

In reviewing a motion to dismiss under Rule 12(b)(6), the court must assume the truth of all factual allegations and must construe them in the light most favorable to the nonmoving *party. Thompson v. Davis,* 295 F.3d 890, 895 (9th Cir. 2002), *cert denied, b* U.S.__, 123 S.Ct. 1570 (2003); *Cahill v. Liberty Mut.* Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). However, legal conclusions need not be taken as true merely because they are cast in the form of factual allegations. *Robertson v. Corrothers,* 812 F.2d 1173, ! ! 77 (9th Cir. 1987); *Western Mining Council v. Watt,* 643 F.2d 618, 624 (9th Cir. 1981). "Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors,* 266 F.3d 979, 988 (9th Cir. 2001), *amended by* 275 F.3d 1187 (9th Cir. 2001). When ruling on

a motion to dismiss, the court may consider the facts alleged in the complaint, documents attached to the complaint, documents relied upon but not attached to the complaint when authenticity is not contested, and matters of which the Court takes judicial notice. *Parrino v. FLIP, Inc.*, 146 F.3d 699, 705-06 (9th Cir. 1998); *Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994); *MGIC Indem. Co. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986).

b. Subject Matter Jurisdiction

Federal courts are courts of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). Federal courts are presumptively without jurisdiction over civil actions and the burden of establishing the contrary rests upon the party asserting jurisdiction, *Id.* Federal judicial power extends only to cases and controversies over which a court has subject matter jurisdiction. Fed. R. C iv. P. 12(b)(l); *Barker-Hatch v. Viejas Group Baron Long Capitan Grande Band of Diqueno Mission Indians of Viejas Group Reservation*, 83 F. Supp.2d 1155, 1156 (S.D. Cal. 2000). A federal court must consider its own subject matter jurisdiction prior to ruling on any other motion. *Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 28 (1st Cir. 2000).

2. Analysis

In this case Plaintiff brings two distinct claims against the Defendant: (1) a "temporary" taking claim based on the Defendant's alleged taking of Plaintiff's intellectual property over a twelve year period; and (2) a Federal Tort Claims Act for the "tortious acts committed during the course of that taking, which include fraud, conspiracy to defraud, perjury,

and the suppression of evidence of those acts." *Complaint*, p. 1. Defendant maintains that both claims are barred.

a. The Effect of Prior Lawsuits On Plaintiff's Temporary Taking Claim

Plaintiff's first claim is for the temporary taking of his intellectual property fights. Defendant argues that (1) Plaintiff's taking claim is not cognizable under the Federal Tort Claims Act, (2) is barred by the doctrines of res judicata and collateral estoppel, (3) is barred by the six year statute of limitations, and (4) that 35 U.S.C. § 183 provides the exclusive remedy. The Court first addresses Defendant's res judicata argument.

Res judicata, or claim preclusion, precludes the relitigation of a claim previously tried and decided. *Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1320 (1992). Any basis or theory of recovery that a litigant could have asserted in the previous litigation, is barred by res judicata if the prior suit was between the same parties on the same cause of action. *Id; Owens v. Kaiser Found Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001). "Res judicata applies when there is: (1) an identity of claims; (2) a final judgment on the merits; and (3) identity or privity between the parties." *Stuart v. U.S. Bancorp*, 297 F.3d 953, 956 (9th Cir. 2002). Courts in the Ninth Circuit look to the following factors to determine if a cause of action is the same as brought in a previous litigation: (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same fight; and (4) whether the two suits arise out of the same transactional nucleus of facts. *Clark*, 966 F.2d at 1320.

The Court finds that all of the factors for res judicata are met in this case. Plaintiff has previously brought lawsuits alleging the same theory of recovery he asserts in his first cause of action - a taking of his intellectual property rights by the identical defendant, the United States of America. In addition, the earlier cases litigating Plaintiff's taking claim reached final judgment on the merits.

In 1989, Plaintiff brought a suit against the same Defendant on claims for damages resulting from the alleged taking by classification of his patent and the imposition of a secrecy order on that application. *Hornback v. United States,* Civil No. 89-1914-R(M) (S.D. Cal. Oct. 2, 1992), *aff'd,* 16 F.3d 422 (Fed. Cir. 1993). The district court granted summary judgment in favor of the Defendant concluding that 35 U.S.C. § 183 provided the exclusive remedy for Plaintiff's asserted injury and that Plaintiff's asserted damages were entirely speculative.[4]

In 1994, Plaintiff again sued Defendant, alleging a taking stemming from the classification of his invention as secret. *Hornback v. United States,* Civil No. 94-0952-IEG (S.D. Cal.), *aff'd,* 91 F.3d 152 (9th Cir. 1996). The district court dismissed the complaint for lack of subject matter jurisdiction and refused to transfer the case because the statute of limitations had expired. *Id.* Plaintiff also pursued five prior cases (two of which were consolidated) in the Court of Federal Claims claiming that Defendant's classification of his

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[4] Summary judgment is a judgment on the merits. *Colello v. United States Sea & Exech. Comm 'n,* 908 F. Supp. 738, 747 (C.D. Cal. 1995). Accordingly, such a judgment is entitled to res judicata effect in subsequent litigation. Schwarzer, Tashima, and Wagstaffe, *California Practice Guide: Federal Civil Procedure Before Trial,* § 14:28 (2004).

patent application and the imposition of a secrecy order on that application constituted a taking under the Fifth Amendment.

Plaintiff attempts to distinguish the instant case from his previous suits by arguing that he is now pursuing a "temporary" takings claim. The Fifth Amendment's prohibition on the taking of private property for public use without just compensation applies to both "temporary" and "permanent" takings. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302, 347-48 (2002). Plaintiff pursued a temporary taking claim before the Court of Federal Claims in Case No. 02-1915 C. There, the Court of Federal Claims held that his claim was barred by res judicata and the Federal Circuit affirmed. *Hornback,* 56 Fed. Cl. at 363, *arid,* No. 03-5099 (Fed. Cir. Jan. 13, 2004). The Federal Circuit held:

> First, Hornback asserts that the doctrine of res judicata is inapplicable because the Court of Federal Claims did not previously address his temporary takings claim on the merits. He distinguishes his claim in the present case from his claim in the earlier Case No. 99-38 C on the Basis that the earlier claim was filed while the secrecy order was in effect and therefore alleged a permanent taking, whereas the present claim was filed after the secrecy order was rescinded and therefore alleged only a temporary taking...
>
> Recently, we affirmed the Court of Federal Claims' dismissal of another of Hornback's takings claims on the ground that Hornback was collaterally estopped from arguing that his firing was timely. [citations omitted] In that case, we specifically addressed

> Hornback's allegation that "for 13 years, [from 1987 when the secrecy order was imposed until 2000 when the patent issued] Plaintiff was deprived of all use of his property." [citations omitted]. Thus, Hornback has previously raised, and we have previously considered the same temporary takings theory that he now asserts in the present case. That claim was adjudicated on the merits when we held that it was untimely, based on Hornback's pervious litigation of the statute-of-limitations issue.

Hornback, No. 035099 (Fed. Cir. Jan. 13, 2004). The Court agrees with the Federal Circuit that the "temporary" takings claim now asserted has been in previously adjudicated in Plaintiff's earlier lawsuits alleging a permanent taking. All the facts giving rise to Plaintiff's cause of action for a temporary taking are the same as those supporting his permanent taking claim. Namely, Plaintiff alleges that the secrecy order placed on his patent application and the classification of his patent application effected a Fifth Amendment taking. Plaintiff has previously litigated those claims. The Court finds that (1) substantially the same evidence is presented in this action and Plaintiff's prior suits against Defendant, (2) the suits involve the infringement of the same right - the alleged taking, whether permanent or temporary of Plaintiff's intellectual property rights, and (3) the suits arise out of the same transactional nucleus of facts. Therefore, the Court finds that the doctrine of res judicata bars the relitigation of Plaintiff's takings claim.

As the Court finds that Plaintiff's first claim for a Fifth Amendment taking of his intellectual property is barred by the doctrine of res judicata, the Court need not discuss Defendant's arguments that Plaintiff's claim is not cognizable under the FTCA, that the claim is barred by collateral

estoppel, the statute of limitations bars the claim or that 35 U.S.C. § 183 provides the exclusive remedy.

b. Plaintiff's Claim for Compensation for Fraudulent Acts Committed During the Alleged Taking

Plaintiff's second claim alleges that the PTO, Department of Defense, or those working on their behalf, committed fraud in the course of committing the alleged taking of Plaintiff's intellectual property (the "improprieties claim"). For instance, Plaintiff alleges that "non-trivial errors" were inserted in his issued patent "for counter-intelligence purposes" which evidences fraud and conspiracy "between the PTO and DOD." *Complaint*, p. 4. Further, Plaintiff alleges that an Air Force attorney perjured himself by stating that the Air Force was instrumental in reducing the classification of Plaintiff's patent application from secret to "classifiable" when according to Plaintiff "classifiable is not a proper classification level." *Id.* Plaintiff also alleges that Defendant suppressed evidence, *Id.* Defendant argues that this Court lacks jurisdiction to entertain Plaintiff's improprieties claim and therefore that claim should be dismissed.

With respect to suits against the United States Government, it is clear that the United States, as a sovereign, is immune from suit unless it consents to be sued. *United States v. Mitchell*, 445 U.S. 535, 538 (1980). Any waiver of that immunity must be unequivocally expressed. *Id. The* FTCA is an express waiver of sovereign immunity under which the United States is subject to suit in actions sounding in tort. See 28 U.S.C. § 1346(b). The scope of the federal government's consent to be sued in tort is limited by the exceptions set forth in 28 U.S.C. § 2680. If a case falls within any exception to the waiver, the court lacks subject matter and

the case must be dismissed. *See United States v. Gaubert*, 499 U.S. 315, 323 (1991); *Monaco v. United States*, 661 F.2d 129, 131 (9th Cir. 1981).

28 U.S.C. § 2680(h) specifies that the FTCA's waiver of sovereign immunity does not apply to "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. § 2680(h); *see Wilson v. Drake*, 87 F.3d 1073, 1076 (9th Cir. 1996). Plaintiff's impropriety claim alleges that the Defendant committed several acts constituting fraud against him during the pendency of the secrecy order on his patent application, including the allegations described above. Misrepresentation and deceit are torts that are specifically excluded from the waiver of sovereign immunity under the FTCA. 28 U.S.C. § 2680(h). Allegations of fraud are akin to allegations of misrepresentation and deceit. *See Safeway Portland Employees' Fed. Credit Union v. Fed. Deposit Ins. Corp.*, 506 F.2d 1213 (9th Cir. 1974) (scheme to defraud the public is within the misrepresentation and deceit exception under 28 U.S.C. § 2680(h)); *see* W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS § 105 (5th ed. 1984). Accordingly, Plaintiff's improprieties claim is excluded under the waiver of sovereign immunity under the FTCA and therefore this Court lacks subject matter jurisdiction to adjudicate that claim.

B. Plaintiff's Motion for Summary Judgment

Plaintiff moves for summary judgment on grounds that there are no genuine issues as to any material facts and he is entitled to judgment as a matter of law. Defendant opposes Plaintiffs motion.

1. Legal Standard

Summary judgment is appropriate under Rule 56 of the Federal Rules of Civil Procedure where the moving party demonstrates the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. Fed. R. Cir. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is material when, under the governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute over a material fact is genuine if "the evidence is such that a reasonable jury couid return a verdict for the nonmoving party." *Id.*

A party seeking summary judgment always bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The moving party may meet this burden in two ways: (1) by presenting evidence that negates an essential element of the nonmoving party's case or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *Id.* at 322-23. If the moving party fails to discharge this initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-60 (1970).

If the moving party satisfies its initial burden, the nonmoving party cannot defeat summary judgment merely by demonstrating "that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *see also Anderson*, 477 U.S. at 252 ("The mere existence of a scintilla of evidence in support of the nonmoving party's position is not

sufficient."). Rather, the nonmoving party must "go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)) (internal quotations omitted).

In ruling on a motion for summary judgment, "[t]he district court may limit its review to the documents submitted for purposes of summary judgment and those parts of the record specifically referenced therein." *Carmen v. San Francisco Unified Sch.* D/st., 237 F.3d 1026, 1030 (9th Cir. 200 I). Therefore, the court is not obligated to "scour the record in search of a genuine issue of triable fact." *Keenan v. Allen*, 91 F.3d 1275, 1279 (9th Cir. 1996) (citing *Richards v. Combined Ins. Co.*, 55 F.3d 247, 251 (7th Cir. 1995)). The court must view all inferences drawn from the underlying facts in the light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587. "Credibility determinations [and] the weighing of evidence ... are jury functions, not those of a judge, [when] he [or she] is ruling on a motion for summary judgment." *Anderson*, 477 U.S. at 255.

2. Analysis

Plaintiff's motion for summary judgment fails because he cannot demonstrate that there are no factual disputes and that he is entitled to judgment as a matter of law. As discussed above, Plaintiff's claim for Fifth Amendment taking is barred by the doctrine of res judicata. In addition, this Court lacks subject matter jurisdiction to entertain Plaintiff's improprieties claim.

As such the Court **DENIES** Plaintiff's motion for summary judgment.

IV. CONCLUSION

Having reviewed the papers submitted and the relevant law, **IT IS HEREBY ORDERED** that Plaintiff's motion for summary judgment is **DENIED. IT IS FURTHER ORDERED** that Defendant's motion to dismiss Plaintiff's complaint is **GRANTED**. The Court **DISMISSES** Plaintiff's Complaint with prejudice.

IT IS SO ORDERED.

APPENDIX E

INDUSTRIAL SECURITY MANUAL FOR SAFEGUARDING CLASSIFIED INFORMATION

Department of Defense

January 1991

DEFENSE INVESTIGATIVE SERVICE
1900 Half St., S.W.
Washington, D.C. 20324-1700
January 3, 1991

FOREWORD

This Manual is issued under the authority of DoD Directive 5220.22, "DoD Industrial Security Program," December 8, 1980. Its purpose is to provide uniform security requirements for safeguarding information of the Department of Defense, certain other federal agencies, and Certain foreign governments, that is released or disclosed to Industry in connection with classified contracts under the Defense Industrial Security Program.

The provisions of this Manual apply to all industrial, educational, commercial and other organizations and entities that have executed a DoD Security Agreement (DD Form 441) or a DoD Transportation Security Agreement (DIS Form 1149) with the Department of Defense.

This Manual supersedes DoD 5220.22-M, March 1989. The revisions of this Manual are required by the demands of national security as determined by the Government, notice of which is hereby furnished pursuant to section 1A(I) of the DD Form 441 and section 1A of the DIS Form 1149.

Users of this publication are encouraged to submit recommended changes and comments to their cognizant security office, Defense Investigative Service.

This Manual is effective immediately, and is mandatory for use by all industrial firms cleared under the Defense Industrial Security Program.

An initial distribution of this Manual will be made to current participants in the Defense Industrial Security Program. Additional copies may be obtained from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

/s/ John F. Donnelly
Director

SECTION 3. STORAGE AND STORAGE EQUIPMENT

5-300. General. Classified information shall be stored under conditions adequate to prevent unauthorized persons from gaining access. Contractors shall not be eligible to receive, nor have possession of, classified material at their cleared facilities until they have adequate storage capability approved by the CSO. Classified material, when not in actual use and under the control of an appropriately cleared person, shall be stored and protected in accordance with this Section.

5-301. Standards for Storage Equipment. The General Services Administration (GSA) establishes and publishes uniform standards, specifications, and supply schedules for containers, vaults, and associated security devices and equipments suitable for the storage and protection of classified information. Cabinets, manufacturers, and prices of storage equipment approved by the GSA are listed in the Federal Supply Schedule (FSS) catalog (FSC GROUP 71-Part III). Copies of specifications and schedules may be obtained from any regional office of the GSA.

5-302. TOP SECRET STORAGE. TOP SECRET material shall be stored in an approved security container or in an approved Class A, B, or C vault, with supplemental controls.

5-303. TOP SECRET Supplemental Controls. During nonworking hours, the following area (room, building or structure) controls are required for TOP SECRET material.

a. Entry to the area in which the container is located shall be controlled by a SECRET cleared, authorized employee or guard stationed to control access to the area, or by a lock which provides reasonable protection against surreptitious entry; and

b. The interior of the area (whichever is controlled in accordance with paragraph a. above) shall be patrolled and each container inspected at least once every two (2) hours by a SECRET cleared guard who is supervised by a system that provides a record of the coverage of key points within the area; or

c. The area in which the container is located, or the container itself, shall be equipped with an approved alarm system.

5-304. SECRET Storage. SECRET material shall be stored in an approved security container or vault authorized for the storage of TOP SECRET without supplemental controls, or in a security cabinet or strongroom as follows:

a. A safe, steel file cabinet, or safe-type steel file container which has an automatic unit locking mechanism and an approved built-in combination lock, with supplemental controls.[1]

b. Any steel file cabinet which has five sides enclosing the drawers (including a bottom that is permanently attached by welding, rivets or peened bolts so it may not be removed without leaving visible evidence of entry) and is secured by a

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[1] These cabinets will not be authorized for storage of SECRET information effective July 1, 1998 unless the cabinets themselves are alarmed, or they are located in an alarmed area, closed area, or strongroom during non-working hours. (Case by case exceptions may be granted by the CSO.) All facilities cleared after June 20, 1988 must conform to these standards prior to receiving approval to safeguard SECRET material.

rigid metal lock bar and an approved combination padlock, with supplemental controls.[2] See NOTE.

5-513. Disclosure During Visits. Contractors may disclose classified information during visits provided the visit is necessary for a government purpose; the parties involved possess the appropriate clearances, and have a need-to-know for the classified information; appropriate security measures are taken as necessary to preclude unauthorized disclosure of classified information; and the number of classified visits is held to a minimum consistent with contractual requirements.

a. Contract Related Visits. When there is a classified contractual relationship between the parties involved, classified information may be disclosed without a need-to-know certification from the User Agency that has jurisdiction over the information. Such visits are Category 1 visits.

b. Non-contract Related Visits. When there is no classified contractual relationship between the parties involved, classified information may not be disclosed without a need-to-know certification from the User Agency that has jurisdiction over the information. Such visits are Category 2 visits.

c. Visit Procedures. See Chapter 6.

5-514. Disclosure at Contract Related Meetings. Contractors may disclose classified information at a meeting

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[2] The keepers of the rigid metal lock bar shall be secured to the cabinet by welding, rivets, or bolts, so they cannot be removed and replaced without leaving evidence of the entry. The drawers of the container shall be held securely, so their contents cannot be removed without forcing open the drawer.

conducted pursuant to a classified contract without specific authorization of the User Agency, provided:

a. The meeting is held only in the contractor's or subcontractor's cleared facility and the meeting site is physically secure.

b. Attendance at the meeting is limited to cleared persons who have a need-to-know in connection with the contract, including employees of the contractor or subcontractor, consultants, and User Agency representatives.

c. Security controls are established to ensure proper safeguarding of the classified information involved.

d. The contractor conducting the meeting shall ensure that classified documents, notes, minutes, recordings, or summaries resulting from the meeting are properly classified and safeguarded, and that attendees are given sufficient classification guidance during oral presentations. Classified material removed from the meeting site shall be transmitted as required by this Manual for the level of classified information involved.

5-515. Disclosure at Non-contract Related Meetings. Contractors may disclose classified information at non-contract related meetings provided written approval for disclosure of the classified information at the meeting is obtained from the User Agency that has jurisdiction over the information and the meeting is sponsored for security purposes by a User Agency.

5-516. User Agency Sponsorship of Meetings. Disclosure of classified information to large audiences increases security risks and may involve substantial costs to provide adequate

security and must be limited to the minimum necessary. However, classified meetings which serve a government purpose and at which adequate security measures have been provided in advance, may be conducted by a cleared contractor provided the meeting is sponsored by a User Agency. User Agency sponsorship means that a User Agency that has principal interest in the classified subject matter of the meeting must approve the meeting's security arrangements, announcements, attendees, and the location of the meeting. The User Agency may delegate certain responsibilities to a cleared contractor, under the general supervision of the User Agency, for the security arrangements and other actions necessary for the meeting.

a. Requests for Sponsorship. Contractors desiring to conduct meetings requiring sponsorship shall submit their requests to the User Agency having principal interest in the subject matter of each meeting. Only one User Agency may sponsor a meeting. Therefore, a request shall be sent to only one User Agency at a time. If that agency declines to accept sponsorship, or if it is appropriate to change the sponsoring agency, the request may be sent to another User Agency having a principal interest in the subject matter of the meeting. Such requests shall include the details concerning all prior requests. A request classification or upgrading to a higher classification, or believe that the security classification guidance provided is improper or inadequate, are required to discuss such issues with the pertinent User Agency for remedy. If a solution is not forthcoming, and the contractor believes that corrective action is still required, a formal challenge shall be made to the User Agency that originally classified the information. Such challenges shall include a description sufficient to identify the issue, the reasons why the contractor believes that corrective action is required, and any recommendations for appropriate corrective action. In any

case, the information in question shall be safeguarded as required by this Manual for its assigned or proposed level of classification, whichever is higher, until action is completed. If no answer is received within 45 days, the CSO may be requested to provide assistance in obtaining a response. The fact that a contractor has initiated such a challenge will not, in any way, serve as a basis for adverse action by the User Agency involved. If a contractor believes that adverse action did result from a classification challenge, full details should be furnished promptly to the CSO for resolution.

4-105. Contractor Developed Information. Whenever a contractor develops an unsolicited proposal or originates information not in the performance of a classified contract, the following rules shall apply:

a. If the information contained in the proposal or other material, was previously identified by a User Agency as classified, the proposal or other material shall be classified in accordance with an appropriate DD Form 254, classification guide, or source document and marked as required by this Chapter.

b. If the information does not fall within a. above, and the contractor believes the proposal or other material contains information which may, or should, be classified, the contractor is requested to protect the information as though classified at the appropriate level and submit it to a User Agency that has an interest in the subject matter for a classification determination. In such a case, the following protective marking, or a similar marking that clearly conveys the same meaning, shall be used:

CLASSIFICATION DETERMINATION PENDING- Protect as though classified (TOP SECRET, SECRET, or CONFIDENTIAL).

This marking shall appear conspicuously at least once on the material but it is not necessary to further mark it until a classification determination is received. In addition, contractors are not precluded from marking such material as company-private or proprietary information. Pending a determination by a User Agency, the contractor is requested to handle and protect the information as prescribed by this Manual for the classification level recommended. It should be noted, however, that E.O. 12:356 prohibits a User Agency from classifying information over which the Government has no jurisdiction. The proposal or other material submitted may not be classified by a User Agency unless: (I) it incorporates classified information to which the contractor was given prior access, or (ii) the Government first acquires a proprietary interest in the information.

4-106. Classified Information Appearing in Public Media. The fact that information currently classified by a UA has appeared in a public medium does not mean that it is automatically declassified. Contractors shall continue the classification until formally advised to the contrary by the User Agency. Questions as to the propriety of continued classification in these cases should be brought to the immediate attention of the UA.

4-107. Downgrading or Declassifying Classified Information. Information is downgraded or declassified based on the loss of sensitivity of the information due to the passage of time or on occurrence of a specific event, information that continues to meet the classification criteria, despite the passage of time, shall remain classified and

continue to be protected. Contractors downgrade or declassify information based on the guidance provided in a DD Form 254, upon formal notification, or as shown on the material. These actions constitute implementation of a directed action rather than an exercise of the authority for deciding the change or cancellation of the classification. At the time the material is actually downgraded or

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No.04-CV0339-WQH (Wmc)

[Filed February 19, 2004]

ALTON B. HORNBACK, Plaintiff,	)
v.	)
UNITED STATES OF AMERICA Defendants.	)

COMPLAINT FOR DAMAGES PURSUANT TO THE FEDERAL TORT CLAIMS ACT (28 U.S.C.A 1346(b), 2674)

I. CAUSE OF ACTION

Plaintiff Alton B. Hornback, brings this suit for just 18 compensation and damages, in the amount of $12 million, for:

(1) the theft, or tortious "temporary" taking, of all use by Plaintiff, of his intellectual property over a 12-year period; and

(2) for other tortious acts committed during the course of that taking, which include fraud, conspiracy to defraud, perjury, and the suppression of evidence of those acts.

Those acts stem from the specifications in the Secrecy Orders 25 imposed on Plaintiff's patent application allegedly pursuant to Section 181 of the Invention Secrecy Act of 1952 (35 U.S.C. 181-188), which mandate compliance with Executive Order 12356 of 1982.

APPENDIX G

UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office

[Filed, 4/25/86]

Pat. & T.M. Office Mailed Aug 24, 1987
Licensing and Review

Serial No.: 859,033
Applicant: Alton B. Hornback
Title: Real Time Boresight Error Slope Sensor

To be protected at Classification Level of:

Top Secret,
XXX Secret
Confidential
Special Instructions:

Sponsoring Agency & Address:

U.S. AF/JACP
Chief, Patent Div.
1900 Half. St. S.W.
Washington, DC 20324

SECRECY ORDER AND PERMIT FOR DISCLOSING CLASSIFIED INFORMATION

(Title 35, United States Code, sections 181-188 (1952))

NOTICE: To the applicant(s) above named; his, her, or their heirs; and any and all of the assignees, licensees, attorneys and agents, hereinafter designated principals:

You are hereby notified that the above-identified patent application has been found to contain subject matter which discloses classifiable information. The unauthorized disclosure of such subject matter would be detrimental to the national security, and you are ordered to keep the subject matter secret (as required by 35 U.S.C. 181) and you are further ordered NOT TO PUBLISH OR DISCLOSE the subject matter to any person except as specifically authorized herein.

Any other patent application already filed or hereafter filed in the U.S. or any foreign country which contains any significant part of the subject matter of the above-identified patent application falls within the scope of this Order. If such other patent application is not under a Secrecy Order imposed by the U.S. Patent and Trademark Office, it and the common subject matter need to be brought to the attention of the Director, Group 220, Attn: Licensing and Review, U.S. Patent and Trademark Office, Washington, D.C. 20231 as soon as possible.

Publication or disclosure of the subject matter of the above-identified patent application, except as authorized herein or subsequently by the Commissioner of Patents and Trademarks, may subject the person publishing or disclosing the subject matter to the penalties of 35 U.S.C. 182, 185 and 186 (1951).

The subject matter of the above-identified application has been determined to be encompassed by E.O. 10865, entitled "Safeguarding of Classified Information Within Industry" or E.O. 12356, entitled "National Security Information" and

thus is subject to the "Industrial Security Manual for Safeguarding Classified Information."

The principals shall protect the subject matter as required by the Industrial Security Manual for Safeguarding Classified Information and may disclose the subject matter of the above-identified application to other persons having the requisite clearance on a "need-to-known basis" provided the person to whom the subject matter is disclosed is furnished with a copy of this Secrecy Order and is informed that this Secrecy Order is applicable to the subject matter disclosed. The declassification, in whole or in part, of the subject matter of the above-identified application does not modify this Secrecy Order. The requirements of this Secrecy Order remain in effect until the Secrecy Order is rescinded or modified by the Commissioner of Patents and Trademarks. The fact that the subject matter as a whole is declassified should be brought to the attention of the sponsoring agency.

This permission to disclose does not authorize the disclosure of the subject matter of the above-identified application through (1) the filing of any foreign application without specific permission of the Patent and Trademark Office, or (2) the export of any item or data without any export license which may be required.

This order should not be construed in any way to mean that the Government has adopted or contemplates adoption of the invention disclosed in this application and it is not any indication of the value of such invention.

/s/ Kenneth L. Cage
Director, Special Laws Administration

APPENDIX H

U.S DEPARTMENT OF COMMERCE
Patent and Trademark Office

Serial No. 06/859,033
Filing Date: 4/25/86
First Named Applicant: Hornback
Date Mailed: 9/17/87

Alton B. Horback
5650 Bloch Street
San Diego, CA 92122

NOTICE OF ALLOWABILITY (FORM D-10)

This application is now in condition for allowance, and the prosecution is closed. However, in view of the secrecy order issued August 24, 1987, under 35 U.S.C. (1952) 181, this application will be withheld from issue during such period as the national interest requires.

The allowable clams are: 3-6

/s/ Charles Jordan
Examiner

APPENDIX I

U.S DEPARTMENT OF COMMERCE
Patent and Trademark Office

Serial No. 06/859,033
Filing Date: 4/25/86
First Named Inventor: Hornback
Date Mailed: 4/21/99

RESCINDING ORDER

The Secrecy Order dated 8-24-87 prohibiting disclosure or publication of the subject matter of the above entitled application under the provision of Title 35 United States Code (1952) 181-188 is hereby rescinded. Normal prosecution is continued and any suspension thereof because of the secrecy order should now the removed. This rescinding order does not affect the provisions of any classified government contract or existing laws relating to espionage and national security.

/s/ _____
Director
Special Laws Administration Group

APPENDIX J

UNITED STATES PATENT

HORNBACK
Patent Number: 6,079,666
Date of Patent: Jun. 27, 2000

REAL TIME BORESIGHT ERROR SLOPE SENSOR

Inventor: Alton B. Hornback
5650 Bloch St.
San Diego, Calif. 92122

Appl. No.: 06/859,033

Filed: Apr. 25, 1986

Int. Cl. F41G 7/00

U.S. Cl. 244/3.19; 244/3.16; 244/3.15

Field of Search 244/3.16

References Cited

U.S. PATENT DOCUMENTS

4.303.211 12/1981 Dooley et al. 244/3.19

OTHER PUBLICATIONS

Waymeryer, W.K. and Macala, G.A., "Intercept Guidance and Control Concepts Demonstration", AFATL-TR-79-59, pp. 74-79, Feb. 1978.

Yost, D.J., Weckesser, L.B. and Mallalieu. R.C., "Technology Survey of Radomes for Anti-Air Homing Missiles", FS-80-22, Johns Hopkins University Applied Physics Laboratory, Mar. 1980.

Primary Examiner- Charles T. Jordan
Assistant Examiner- Theresa M. Wesson

ABSTRACT

In a missile which employs a terminal homing seeker and a proportional navigation guidance law the space rate o f change of boresight error, i.e., the boresight error slope, is one of the predominant error sources.

It has been found that the boresight error slope is proportional to the curvature of the seeker open loop transfer characteristic. Accordingly, the boresight error slope sensor senses the curvature of the seeker open loop transfer characteristic. This is accomplished by intermittently dithering the seeker instantaneous field-of-view about the line of sight at a rate too great for the normal tracking loop to respond. Thus, the open loop transfer characteristic is obtained while leaving the normal tracking loop unperturbed. The curvature of the open loop transfer characteristic is then obtained in real time by computing the "second difference" from the measured open loop transfer characteristic.

4 Claims, 3 Drawing Sheets